DIRECT TESTIMONY

OF

A. OLUSANJO OMONIYI

POLICY DEPARTMENT

TELECOMMUNICATIONS DIVISION

ILLINOIS COMMERCE COMMISSION

TDS METROCOM, LLC
(TDS METROCOM)
v.
ILLINOIS BELL TELEPHONE COMPANY
d/b/a (SBC ILLINOIS)
COMPLAINT CONCERNING IMPOSITION OF UNREASONABLE AND ANTI-COMPETITIVE TERMINATION CHARGES BY ILLINOIS BELL TELEPHONE COMPANY
DOCKET NO. 03-0553

FEBRUARY 11, 2004

INTRODUCTION

Q. Please state your name and business address.

A. My name is A. Olusanjo Omoniyi and my business address is 527 East Capitol Avenue, Springfield, Illinois 62701.

Q. What is your occupation?

A. I am a Policy Analyst in the Telecommunications Division of the Illinois Commerce Commission (the "Commission").

Q. Describe your educational and professional background.

A. In 1987, I graduated from Southern Illinois University at Carbondale with a Bachelor of Arts degree in Cinema & Photography and a Bachelor of Science degree in Radio-Television. I obtained a Master of Arts degree in Telecommunications in 1990 and a Juris Doctor degree in 1994, also from Southern Illinois University at Carbondale. I am licensed to practice before the Supreme Court of Illinois, the United States District Court, Southern District of Illinois and the United States Court of Appeals for the Seventh Circuit.

I have been involved in various aspects of the telecommunications industry for over a decade, including Internet development, systems integration, broadcasting, long-distance telephone service resale and telecommunications practice. I have been the owner, part-owner and legal advisor for an Internet access provider. I was one of the original founders of Internet Developers Association (IDA), which has now metamorphosed into the Association of Internet Professionals (AIP). I have been co-founder and part owner of Bizhelp Services, a computer systems integration and Internet development business. Between 1996 and 1998, prior to my employment at the Commission, I was a reseller of pre-paid calling cards for Southern New England Telephone Company and an agent of a long distance telephone services reseller, TTE of Baltimore, Maryland. Upon my employment with the Commission, I divested all my interests in the telephony businesses, telecommunications-related law practice and removed all my business websites in order to avoid any potential conflict of interests.

Over the years I have educated myself about the telecommunications industry through various sources such as the National Exchange Carrier Association, the national trade association for common carriers; operations of major telephone companies like SBC, GTE, AT&T and BellSouth; information from independent consulting firms such as the Aberdeen Group, Boston Consulting Group, Frost & Sullivan, The Precursor Research®, PriceWaterhouse, The Strategis Group, and their various independent consulting reports. In addition, I have followed both state and federal regulations of the telecommunications industry. Finally, I am a member of a number of telecommunications professional associations including the Giga Information Group ExperNet and the Federal Communications Bar Association.

Q. Can you describe the purpose of your testimony?

A. The purpose of my testimony is to present my analysis, findings and recommendations regarding the underlying complaint concerning imposition of early termination penalties charges by Illinois Bell Telephone Company ("SBC"). In particular, my testimony supplements the testimony of another Staff witness Mr. Robert Koch, ICC Staff Exhibit 2.0, in this docket who addresses several other issues.[1] In the instant testimony, I will address the policy issues related to this docket by examining:

1. SBC's current early termination penalty policies and effects on competition and customers;
2. TDS Metrocom's position that current SBC early termination penalties are unreasonable and anti-competitive in nature;
3. SBC's counterview that early termination penalties are now being revised as it plans new termination penalty policies; and
4. Comparison of this proceeding with the Ascent Order and recommendations.

[1] See ICC Staff Exhibit 2.0.

I THE CATEGORIES OF SBC SERVICES

Q. Please describe SBC services in question in the instant docket.

A. SBC has broadly categorized its services that are the subject of this docket into three functional categories:[2]

1) Centrex Services: (central office exchange service): services that provide intercom dialing between business customers' employees using a single system and sophisticated routing options. This is a type of PBX service in which the switching functions occur in a SBC central office instead of at the business customer premises. Typically, the telephone company, SBC, owns and manages all the communications equipment necessary to implement the PBX and then sells various services to the customer. [3]

2) Usage Services: include service agreements for Access/Usage, Master Discount Agreements, NETSPAN and Toll/800 services based on the volume of use.[4]

3) Transport/Other Services: consist service agreements for DS-1, DS-3, ISDN Prime, ISDN Direct Multi-Service Optical Networks ("MON") SONET, GigaMan® and ADTSE (Ameritech Digital Transport Service – Enhanced) that are based on traffic.[5]

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[2] See SBC Illinois Exhibit 1.0 (Gillespie), Schedule BG-1. and TDS Metrocom Ex. 1.0, p.12.

[3] *Id*.

[4] *Id*.

[5] *Id*.

All of the above-listed services also have the following two common options:

1. Month-to-month – which does not require that customers retain SBC services for any specific period and, accordingly, has no termination fees.[6]

2. Term Agreement -- which requires that customers commit to a set period of time and pay early termination fees based on a percentage of the charges remaining on the contract.[7]

II CURRENT SBC TERMINATION PENALTY POLICIES

Q. What are the current SBC early termination penalties?

A. Current SBC early termination penalties can be categorized into three groups:

1) Payment of a preset percentage of the charges remaining on the contract: this process requires calculation of penalties in prospective form. SBC claims it does not universally use this term plan. In addition, SBC classifies this type of penalty as "forward-looking."[8] For instance this penalty is calculated as follows: Customer A has a 3-year contract with SBC with a monthly commitment of $100,000 and 75% early termination penalty. If Customer A later terminates its contract after just 6 months, by switching to another carrier, SBC will charge Customer A 75% monthly early termination penalty for each of the remaining two and half years or 30 months.

[6] SBC Illinois Ex. 1.0 (Gillespie), pp.3-4.

[7] *Id*.

[8] SBC Illinois Ex. 1.0 (Gillespie), pp.4-5.

2) Give-Back-the Discount Penalty: this process involves requiring customers to return the discount they were given by SBC prior to the termination of their services. In certain circumstances if a customer has been in a contract for more than a year, the customer only needs to return the discounts for twelve months prior to the termination. SBC calls this type of early termination penalty, "backward-looking." This is essentially what the Ascent Order mandated for the family of ValueLinks services. For example, Customer B is in a contract with SBC in which it has obtained a 12% discount on its monthly bill in a 3-year contract. If Customer B terminates its contract after 18months of service, according to the give-back-the discount penalty policy, Customer B only needs to return the 12% discount it has obtained under its contract for the past twelve months prior to the termination.

3) Minimum Annual Revenue Commitment (MARC): this penalty is based on a customer's commitment to spend a minimum amount on an annual basis. If a customer fails to meet the MARC, the customer would be billed the difference between its obligation and actual service expenses. However, the MARC penalty also goes further in terms of early termination, in that if a customer terminates its services before the end of the contract term with SBC, the MARC would be used to calculate its early termination penalties. SBC typically calculates the penalties in terms of a percentage of the MARC

for the remaining of each year. Thus, this penalty is also “forward-looking” in approach. For instance, assume Customer C is in a 3-year contract with a MARC of $100,000 and an early termination penalty that requires Customer C to pay a 50% penalty upon an early termination. If Customer C terminates its contract after 6-months, Customer C will be charged 50% of the MARC for the remaining 6 months of the first year plus 50% for the unfilled second and third years.

Q. Which of the termination penalties is SBC using for the three categories of services in this docket?

A. As of now, SBC appears to apply just two of its early termination penalty types, give-back-the discount and the MARC, in its Centrex, Usage and Transport Services/Other services. Customers who terminate their services are being charged a fixed percentage of their unfulfilled commitment. Also, a common strand is that SBC simply charges fixed percentages ranging between 50% and 100%.[9]

Q. What are the implications of SBC’s current early termination penalty policies to customers, competing carriers and the public?

A. First, a customer that terminates its agreement with SBC based on their current termination penalty policies risks bearing a sizeable penalty that is not proportional to the actual loss that such a customer caused SBC. Second, such customers are not likely to switch their services to a competing carrier (such as TDS Metrocom) even when

[9] TDS Metrocom Ex. 1.0, p.14.

the customer may be seeking a new telecommunications carrier. SBC's early termination policies, consequently, may create a chilling effect on customers. Finally, a situation in which customers cannot switch or are prevented from switching to another competing carrier will likely reduce the number of customers that all carriers can compete for in the marketplace.

Q. What are the likely implications of the current termination penalty policies of SBC?

A. First, the fixed percentages that range between 50% and 100% may actually result in a windfall for SBC because customers are being required to pay for services that are not being offered to them. Second, a situation in which customers cannot switch their services as a result of the size of the penalties they would incur can only lead to those customers remaining with SBC. In fact, it will be financially imprudent for customers to pay the penalties, which may be relatively large amounts, to SBC when they no longer receive telecommunications services from SBC. For instance, TDS claims that some of the SBC early termination penalties range between $12,800 and $3,400,000.[10] The amounts of these penalties show that it will be simply imprudent for customers to pay any of these substantial penalties because they want to switch their telephony services to another carrier. Third, customers who cannot leave as a result of the high penalties will remain more or less captive customers to SBC.

[10] See TDS Metrocom Ex. 1.0, p.16.

Finally, these high penalty amounts appear to be unreasonable not only by their sheer size but also for the fact that customers are being required to pay them without receiving any service and there is no indication that the size of the early termination penalties are directly related to any loss or damages that SBC may suffer.

III TDS VIEWPOINTS ON SBC CURRENT TERMINATION PENALTIES

Q. What is TDS' position regarding the current SBC early termination penalties?

A. TDS argues that the current SBC early termination penalty policies are anti-competitive as the penalties lock up the market and discourage customers from switching to TDS and other carriers. Therefore, TDS contends it is unreasonable. Also, TDS argues that the early termination penalties should either be removed or reduced in a manner that is compliant with the Ascent Order.[11] Summarily, the Ascent Order requires that SBC should be paid only the unearned discounts it has given to a customer as termination charges and such payment should be limited to the preceding 12months.[12] In addition, TDS argues that current SBC termination penalties are unrelated to losses incurred by SBC in the event of any termination.

Q. What was SBC's reaction to TDS' position?

[11] See TDS Metrocom Ex. 1.0

[12] ICC Docket 00-0024, p. 35.

A. SBC opposes TDS' position on two grounds. First, on the ground that the Ascent Order only applies to the ValueLink family of services and should not be given an expansive interpretation as TDS seems to advocate. Second, SBC argues that it is in the process of revising its early termination penalties that are applicable to the three services, Centrex, Usage and Transport, at issue in the instant docket.

Q. What are your recommendations on the divergent positions of SBC and TDS?

A. On the one hand, it is my belief that TDS' contention that SBC's current termination penalties are unreasonable and anti-competitive in nature is true. On the other hand, I believe that SBC is correct that the Ascent Order addressed just the ValueLink family of services and the implementation of the decision reflected this interpretation even though the general circumstances addressed in the Ascent Order are similar to the issues in the instant docket. In support of my recommendation, I note that the categorization of the services in this docket is different from the categorization in the Ascent Order. For instance in the Ascent Order, services were categorized based on mere labeling while SBC argues in this docket that services are based on functional and routing options.[13] In addition, SBC has indicated that it intends to significantly reduce its early termination penalty policies relating to the three services in the instant docket, Centrex, Usage and Transport Services. Thus, the Commission

[13] SBC Illinois Ex. 1.0, p. 3.

should be cognizant of not only the existing Ascent Order and its possible limitations but, also, consider SBC's proposed early termination penalty policies

IV SBC'S PROPOSED REVISED TERMINATION PENALTIES POLICIES

Q. Please describe SBC's plan to revise its current termination penalty policies?

A. SBC states that it is in the process of revising its termination liability policies.[14] SBC intends to reduce its current termination penalties as follows:

Centrex Services - termination penalties will be set at 25% of the customer's remaining obligation under the tariff plan or agreement.

Usage Services – 35% of the customer's remaining obligation under the tariff plan or agreement.

Transport Services and Other : 50% of the customer's remaining obligation under the tariff plan or agreement.

In addition, SBC indicates that the proposed penalties will be on a "going-forward basis" and will be applied retroactively to existing customers to both tariff plans or contracts. Also, SBC plans to notify its retail business customers and CLECs on the new policy. However, the implementation of

[14] See Attachment to SBC Illinois Response to TDS Metrocom Data Request 2.2.

this policy is at the developmental stage as its various features are still being fleshed out.[15]

Q. What are TDS' reactions to SBC's proposed termination penalty policies?

A. TDS noted that it was notified of SBC's proposed termination penalty policies "three days before" it filed its Direct Testimony.[16] This notwithstanding, TDS still contends that the proposed termination penalty policies are "not based on the return of the benefit the customer did not in fact earn (because of the early termination), but continue to be based on charges for future services that SBC Illinois will never provide."[17] Furthermore, TDS argues that the proposed penalties will still result in significant penalties for the customers.

Q. What are the likely consequences of the revised termination penalty policies?

A. Judging by the fact that the existing termination penalties are between 50% and 100%, SBC's planned termination penalty policies represent a significant lowering of these penalties. The ultimate detail of SBC's new early termination penalty plan is still being developed. As of now, it is simply impossible to judge the cost and policy implications on competition and customers until all the details are known.

[15] *Id*.

[16] TDS Metrocom Ex. 1.0, p. 17.

[17] *Id*. at 18.

Q. What then are your recommendations regarding SBC proposed termination penalty policies?

A. The Commission should require that SBC file the proposed termination penalties under the appropriate tariff plan as SBC has promised. Also, in situations where SBC is not required to include the proposed termination penalties under a tariff plan, the proposed termination penalties should be included in agreements SBC is using for the services in question, Centrex, Usage and Transport Services/Other, as SBC also promises to do.

V. THE ASCENT ORDER AND THIS DOCKET

Q. Is there a relationship between the Ascent Order and this docket?

A. Yes. On the one hand, SBC states that the relationship is very limited, while on the other hand TDS contends that the Commission should apply the Ascent Order to this docket. There are several elements of the Ascent Order that seem to have re-surfaced in the instant docket. First, the dispute involves imposition of early termination penalties involving long-term contracts. Second, the size of early termination penalties in question can be enormous as they are based on percentages that are as high as 100%. Third, the possibility that the contracts in question can result in locking up customers and, thus, adversely affect the competitive marketplace. Finally, the advent of these issues and the Ascent docket less than two years ago, when a similar set of issues had been addressed, shows that early termination penalty policies need to be addressed in greater detail on an industry-wide basis by the Commission.

If, however, the Commission believes that an industry-wide solution is not needed, it can continue to address early termination penalty cases on a case-by-case basis. Thus, future cases can simply be addressed through the complaint procedures just as in Docket 00-0024 and the instant case.

Q. Why do you think an industry-wide policy is necessary?

A. First, this is the second time that early termination penalty policies will be examined by the Commission in roughly three years. Second, TDS' petition raises an important matter to consider. During the Ascent Order proceeding, TDS was not operating in Illinois and invariably did not participate in the Ascent Order. However, between when the Ascent Order was put in place and now, TDS entered the Illinois market and filed the instant complaint, which requires that the Commission re-litigate the issue of early termination penalty policies for a new set of SBC services. Prospectively speaking, the Commission may end up re-litigating the issue of early termination penalty policies again if other CLECs, either new entrants to the Illinois market or existing Illinois CLECs, file similar complaints. Early termination complaints, moreover, could be filed against ILECs other than SBC. Thus, the issue of early termination penalty policies appears to be an issue that is likely to recur unless there is an industry-wide policy in place.

Q. Does this conclude your testimony?

A. Yes.